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022259Z Mar 05

UNCLAS SECTION 01 OF 02 GUATEMALA 000554

SIPDIS

E.O. 12958: N/A

TAGS: PHUM PGOV EVID ASEC MASS SNAR GT

SUBJECT: GUATEMALAN COURT DECISION DELIVERS SETBACK, NOT A FATAL BLOW, TO MASSACRE CASE

1. SUMMARY: On February 16, Guatemala's Constitutional Court issued a clarification of its earlier decision in the appeal of Reyes Collin Gualip, one of 16 soldiers implicated in the 1982 Dos Erres massacre. The court reiterated that the case against Gualip cannot proceed without a decision from the Third Appellate Court, which must decide if the accused is immune from prosecution under the 1996 "Law of National Reconciliation." Importantly, the clarification puts to rest fears that all judicial processes completed since 1996, including key witness testimony, were nullified by its earlier decision. But two worries remain: First, if the Third Appellate Court judges Mr. Gualip immune from prosecution, it would automatically confer immunity to the other 15 defendants. It would also set a precedent, effectively ending the possibility of prosecuting perpetrators of war crimes in Guatemala. Second, even if Gualip is denied amnesty, a series of individual appeals threaten to delay prosecution, and with it justice for the victims, indefinitely. END SUMMARY.

#### Background

2. On December 6-8, 1982, a military unit with soldiers based in Retalhuleu and Peten allegedly massacred almost 300 civilians in Dos Erres, a small settlement in the Peten. In 1994, at the petition of FAMDEGUA (Families of the Detained and Disappeared of Guatemala), forensic scientists exhumed 162 remains, many of women and young children, from a well in the former village. Additionally, in the late 1990s, two former members of the accused military unit came forward to give testimony against other soldiers. FAMDEGUA filed a case with the Inter-American Commission and, in 2000, the Inter-American Court ruled against the GOG. The GOG agreed to pay reparations to the families of victims (which it did, under former President Portillo) and pursue due process in national courts. Dos Erres is a high-profile case due to the barbarity of the crimes committed and is unique for its testimony by supposed collaborators that links the accused to the crimes.

#### The Law of National Reconciliation

3. The 1996 Law of National Reconciliation absolves Guatemalans of penal responsibility for political crimes committed during the civil conflict. Nevertheless, it specifically states that "the law will not be applied to crimes of genocide, torture, and forced disappearance..." The law also states that an appellate court, one specifically empowered to hear cases involving war crimes, must first determine whether a case involves one of these exceptions before the prosecution can proceed. The Third Appellate Court set a precedent with the Rio Negro case, in which it ruled that the Public Ministry could prosecute three former members of the armed paramilitary PAC (Civilian Self-Defense Patrol) for that massacre, leading to the first war crimes convictions in Guatemala. Consequently, sending the case to the Appellate Court will not necessarily terminate the case.

#### The Constitutional Court Grants the Appeal

4. Gualip claims amnesty under the 1996 Law of National Reconciliation. Previously, the Twelfth and Tenth Appellate Courts declined to hear his appeals. Gualip then appealed to the Constitutional Court. In its decision, the Constitutional Court granted the appeal and ordered suspension of all judicial proceedings against the defendant until the Third Appellate Court determines the applicability or not of the Law of National Reconciliation.

#### The Constitutional Court Clarifies

5. The CC published two decisions in this case: the December 2004 judgment, published February 4, and a clarification of that decision, published February 16. The vague wording of the first decision raised alarms with prosecutors and human rights activists, since it could be read to automatically nullify every legal process completed in the case since December 18, 1996. Since key witness testimony appeared to

fall within that category, prospects for prosecuting the case, even with a favorable decision from the Third Appellate Court, looked grim. Accordingly, FAMDEGUA petitioned the court for a clarification of its decision. The February 16 clarification specifically protected the witness testimony and made clear that other penal processes would only be invalidated if the defendant is judged immune under the 1996 law.

#### Legal Appeals Delay Prosecution

16. To date, more than 30 individual and group appeals have been filed by attorneys on behalf of the 16 defendants. Since the case cannot move forward until all appeals have been resolved, it is presently stalled in the Court of First Instance, a court charged with investigating and hearing evidence prior to trial. FAMDEGUA's principal complaint is that the courts have failed to group the appeals and issue a single decision. FAMDEGUA charges that by hearing the appeals individually, courts are failing in their responsibility to expedite the processing of a high-profile case and, worse, may be complicit in prolonging it.

#### Next Steps

17. Frank LaRue, the head of COPREDEH (President's Commission on Human Rights), commented to us that the ruling was by no means a defeat, only a setback. He referred to the similar setback in the Rio Negro massacre case, which was ultimately prosecuted successfully.

18. Public Ministry Special Prosecutor Ana Patricia Lainfiesta told poloff that the Constitutional Court violated procedural rules by failing to inform her office, which has handled the case since the late 1990s, of the proceedings. On that basis, her office petitioned the court to reconsider its December decision and hold a new hearing. As of March 1, her office had received no response to that petition. If the Constitutional Court refuses to rehear the case, prosecutors will have no choice but to take the case to the Third Appellate Court as instructed.

19. FAMDEGUA issued an official statement on February 25 in which it responded to the latest Constitutional Court decision. The statement characterized the court's decision as "contradictory and diffuse," but is not specific about its inadequacies. It also accuses the court of "sponsoring impunity." FAMDEGUA proposes no action, and appears to be awaiting the next judgment.

#### Comment

10. Since the Law of National Reconciliation is unambiguous in its requirement that application of the law in war crimes cases must be decided by a specifically empowered appellate court, the Constitutional Court's decision to send the case to the Third Appellate Court should have been expected. That said, both the Public Ministry and human rights NGOs complain about procedural issues, excessive delays, and vague wording.

Such problems are neither new nor rare and cripple Guatemala's judicial proceedings. Although the pace of Guatemala's court cases is frustratingly slow, we have also found that human rights activists can be indifferent to the due process rights of defendants, particularly when they are ex-military. In the best scenario, the Third Appellate Court will continue the precedent it set in the Rio Negro case and determine that the Law of National Reconciliation does not apply to defendants in the case of Dos Erres.

HAMILTON